

LEGISLATURE OF NEBRASKA
NINETY-SEVENTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 1190

Introduced by Landis, 46

Read first time January 18, 2002

Committee: Judiciary

A BILL

- 1 FOR AN ACT relating to dispute resolution; to adopt the Uniform
- 2 Mediation Act; and to provide severability.
- 3 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 13 of this act shall be known
2 and may be cited as the Uniform Mediation Act.

3 Sec. 2. For purposes of the Uniform Mediation Act:

4 (1) Mediation means a process in which a mediator
5 facilitates communication and negotiation between parties to assist
6 them in reaching a voluntary agreement regarding their dispute.

7 (2) Mediation communication means a statement, whether
8 oral or in a record or verbal or nonverbal, that occurs during a
9 mediation or is made for purposes of considering, conducting,
10 participating in, initiating, continuing, or reconvening a
11 mediation or retaining a mediator.

12 (3) Mediator means an individual who conducts a
13 mediation.

14 (4) Nonparty participant means a person, other than a
15 party or mediator, that participates in a mediation.

16 (5) Mediation party means a person that participates in a
17 mediation and whose agreement is necessary to resolve the dispute.

18 (6) Person means an individual, corporation, business
19 trust, estate, trust, partnership, limited liability company,
20 association, joint venture, government, governmental subdivision,
21 agency, or instrumentality, public corporation, or any other legal
22 or commercial entity.

23 (7) Proceeding means:

24 (A) a judicial, administrative, arbitral, or other
25 adjudicative process, including related prehearing and post-hearing
26 motions, conferences, and discovery; or

27 (B) a legislative hearing or similar process.

28 (8) Record means information that is inscribed on a

1 tangible medium or that is stored in an electronic or other medium
2 and is retrievable in perceivable form.

3 (9) Sign means:

4 (A) to execute or adopt a tangible symbol with the
5 present intent to authenticate a record; or

6 (B) to attach or logically associate an electronic
7 symbol, sound, or process to or with a record with the present
8 intent to authenticate a record.

9 Sec. 3. (a) Except as otherwise provided in subsection
10 (b) or (c) of this section, the Uniform Mediation Act applies to a
11 mediation in which:

12 (1) the mediation parties are required to mediate by
13 statute or court or administrative agency rule or referred to
14 mediation by a court, administrative agency, or arbitrator;

15 (2) the mediation parties and the mediator agree to
16 mediate in a record that demonstrates an expectation that mediation
17 communications will be privileged against disclosure; or

18 (3) the mediation parties use as a mediator an individual
19 who holds himself or herself out as a mediator, or the mediation is
20 provided by a person that holds itself out as providing mediation.

21 (b) The Uniform Mediation Act does not apply to a
22 mediation:

23 (1) relating to the establishment, negotiation,
24 administration, or termination of a collective bargaining
25 relationship;

26 (2) relating to a dispute that is pending under or is
27 part of the processes established by a collective bargaining
28 agreement, except that the act applies to a mediation arising out

1 of a dispute that has been filed with an administrative agency or
2 court;

3 (3) conducted by a judge who might make a ruling on the
4 case; or

5 (4) conducted under the auspices of:

6 (A) a primary or secondary school if all the parties are
7 students; or

8 (B) a correctional institution for youths if all the
9 parties are residents of that institution.

10 (c) If the parties agree in advance in a signed record or
11 a record of proceeding so reflects that all or part of a mediation
12 is not privileged, the privileges under sections 4 to 6 of this act
13 do not apply to the mediation or part agreed upon. However, such
14 sections apply to a mediation communication made by a person that
15 has not received actual notice of the agreement before the
16 communication is made.

17 Sec. 4. (a) Except as otherwise provided in section 6 of
18 this act, a mediation communication is privileged as provided in
19 subsection (b) of this section and is not subject to discovery or
20 admissible in evidence in a proceeding unless waived or precluded
21 as provided by section 5 of this act.

22 (b) In a proceeding, the following privileges apply:

23 (1) A mediation party may refuse to disclose, and may
24 prevent any other person from disclosing, a mediation
25 communication.

26 (2) A mediator may refuse to disclose a mediation
27 communication and may prevent any other person from disclosing a
28 mediation communication of the mediator.

1 (3) A nonparty participant may refuse to disclose, and
2 may prevent any other person from disclosing, a mediation
3 communication of the nonparty participant.

4 (c) Evidence or information that is otherwise admissible
5 or subject to discovery does not become inadmissible or protected
6 from discovery solely by reason of its disclosure or use in a
7 mediation.

8 Sec. 5. (a) A privilege under section 4 of this act may
9 be waived in a record or orally during a proceeding if it is
10 expressly waived by all parties to the mediation and:

11 (1) in the case of the privilege of a mediator, it is
12 expressly waived by the mediator; and

13 (2) in the case of the privilege of a nonparty
14 participant, it is expressly waived by the nonparty participant.

15 (b) A person that discloses or makes a representation
16 about a mediation communication which prejudices another person in
17 a proceeding is precluded from asserting a privilege under section
18 4 of this act, but only to the extent necessary for the person
19 prejudiced to respond to the representation or disclosure.

20 (c) A person that intentionally uses a mediation to plan,
21 attempt to commit, or commit a crime or to conceal an ongoing crime
22 or ongoing criminal activity is precluded from asserting a
23 privilege under section 4 of this act.

24 Sec. 6. (a) There is no privilege under section 4 of
25 this act for a mediation communication that is:

26 (1) in an agreement evidenced by a record signed by all
27 parties to the agreement;

28 (2) available to the public under sections 84-712 to

1 84-712.09 or made during a session of a mediation which is open, or
2 is required by law to be open, to the public;

3 (3) a threat or statement of a plan to inflict bodily
4 injury or commit a crime of violence;

5 (4) intentionally used to plan a crime, attempt to commit
6 a crime, or conceal an ongoing crime or ongoing criminal activity;

7 (5) sought or offered to prove or disprove a claim or
8 complaint of professional misconduct or malpractice filed against a
9 mediator;

10 (6) except as otherwise provided in subsection (c) of
11 this section, sought or offered to prove or disprove a claim or
12 complaint of professional misconduct or malpractice filed against a
13 mediation party, nonparty participant, or representative of a party
14 based on conduct occurring during a mediation; or

15 (7) sought or offered to prove or disprove abuse,
16 neglect, abandonment, or exploitation in a proceeding in which a
17 child or adult protective services agency is a party.

18 (b) There is no privilege under section 4 of this act if
19 a court, administrative agency, or arbitrator finds, after a
20 hearing in camera, that the party seeking discovery or the
21 proponent of the evidence has shown that the evidence is not
22 otherwise available, that there is a need for the evidence that
23 substantially outweighs the interest in protecting confidentiality,
24 and that the mediation communication is sought or offered in:

25 (1) a court proceeding involving a felony (or
26 misdemeanor); or

27 (2) except as otherwise provided in subsection (c) of
28 this section, a proceeding to prove a claim to rescind or reform or

1 a defense to avoid liability on a contract arising out of the
2 mediation.

3 (c) A mediator may not be compelled to provide evidence
4 of a mediation communication referred to in subdivision (a)(6) or
5 (b)(2) of this section.

6 (d) If a mediation communication is not privileged under
7 subsection (a) or (b) of this section, only the portion of the
8 communication necessary for the application of the exception from
9 nondisclosure may be admitted. Admission of evidence under
10 subsection (a) or (b) of this section does not render the evidence,
11 or any other mediation communication, discoverable or admissible
12 for any other purpose.

13 Sec. 7. (a) Except as required in subsection (b) of this
14 section, a mediator may not make a report, assessment, evaluation,
15 recommendation, finding, or other communication regarding a
16 mediation to a court, administrative agency, or other authority
17 that may make a ruling on the dispute that is the subject of the
18 mediation.

19 (b) A mediator may disclose:

20 (1) whether the mediation occurred or has terminated,
21 whether a settlement was reached, and attendance;

22 (2) a mediation communication as permitted under section
23 6 of this act; or

24 (3) a mediation communication evidencing abuse, neglect,
25 abandonment, or exploitation of an individual to a public agency
26 responsible for protecting individuals against such mistreatment.

27 (c) A communication made in violation of subsection (a)
28 of this section may not be considered by a court, administrative

1 agency, or arbitrator.

2 Sec. 8. Unless subject to sections 84-712 to 84-712.09
3 or 84-1408 to 84-1414, mediation communications are confidential to
4 the extent agreed by the parties or provided by other law or rule
5 of this state.

6 Sec. 9. (a) Before accepting a mediation, an individual
7 who is requested to serve as a mediator shall:

8 (1) make an inquiry that is reasonable under the
9 circumstances to determine whether there are any known facts that a
10 reasonable individual would consider likely to affect the
11 impartiality of the mediator, including a financial or personal
12 interest in the outcome of the mediation and an existing or past
13 relationship with a mediation party or foreseeable participant in
14 the mediation; and

15 (2) disclose any such known fact to the mediation parties
16 as soon as is practical before accepting a mediation.

17 (b) If a mediator learns any fact described in
18 subdivision (a)(1) of this section after accepting a mediation, the
19 mediator shall disclose it as soon as is practicable.

20 (c) At the request of a mediation party, an individual
21 who is requested to serve as a mediator shall disclose the
22 mediator's qualifications to mediate a dispute.

23 (d) A person that violates subsection (a), (b), or (g) of
24 this section is precluded by the violation from asserting a
25 privilege under section 4 of this act.

26 (e) Subsections (a), (b), (and) (c), (and) ((g)) do not
27 apply to an individual acting as a judge.

28 (f) The Uniform Mediation Act does not require that a

1 mediator have a special qualification by background or profession.

2 (g) A mediator must be impartial, unless after disclosure
3 of the facts required in subsections (a) and (b) of this section to
4 be disclosed, the parties agree otherwise.

5 Sec. 10. An attorney may represent, or other individual
6 designated by a party may accompany the party to, and participate
7 in a mediation. A waiver of representation or participation given
8 before the mediation may be rescinded.

9 Sec. 11. (1) The Uniform Mediation Act modifies, limits,
10 or supersedes the federal Electronic Signatures in Global and
11 National Commerce Act, 15 U.S.C. 7001 et seq., but the Uniform
12 Mediation Act does not modify, limit, or supersede 15 U.S.C.
13 7001(c) or authorize electronic delivery of any of the notices
14 described in 15 U.S.C. 7003(b).

15 (2) The Uniform Mediation Act is supplemental to the
16 Dispute Resolution Act and in case of conflict the Uniform
17 Mediation Act controls.

18 Sec. 12. In applying and construing the Uniform
19 Mediation Act, consideration must be given to the need to promote
20 uniformity of the law with respect to its subject matter among
21 states that enact it.

22 Sec. 13. (a) The Uniform Mediation Act governs a
23 mediation pursuant to a referral or an agreement to mediate made on
24 or after the effective date of this act.

25 (b) On or after January 1, 2003, the Uniform Mediation
26 Act governs an agreement to mediate whenever made.

27 Sec. 14. If any section in this act or any part of any
28 section is declared invalid or unconstitutional, the declaration

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1 shall not affect the validity or constitutionality of the remaining
2 portions.